INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	9
Conclusion	13

CITATIONS

Cases:

Dunlop v. *United States*, 165 U. S. 486	12
United States v. *Antonelli Fireworks Co.*, 155 F. 2d 631, certiorari denied, 329 U. S. 742	12
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	12

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 517

KATHERINE COHEN AND WILLIAM COHEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions (R. 10) in the Court of Appeals are reported at 177 F. 2d 523.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1946 (R. 12). Upon timely application therefor, petitioners' time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Jackson to December 30, 1949,

and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether certain comments by Government counsel during his closing argument to the jury constitute reversible error.

STATEMENT

Petitioners were jointly indicted in May 1947 in the United States District Court for the Southern District of New York for selling quantities of heroin, in violation of 21 U.S.C. 173, on February 16 (count 1) and March 23, 1947 (count 2) (R. 2).

At the trial, narcotic agents Ross B. Ellis and Leo Palier and former narcotic agent Price C. Spivey [1] testified as follows:

On February 16, 1947, in New York City, Ellis thoroughly searched one Eddie Rosen, who, among others, and entirely of his own volition, had previously approached Ellis, with information about petitioners' narcotic sales to him, and, in accordance with Rosen's suggestion, gave him $10 in bills, the serial numbers of which Ellis listed, to purchase narcotics from petitioners, instructing him to talk to no one but petitioners and to stay in the light as much as possible when dealing with them (Ellis: Tr. 7-9, 46, 49, 50, 51, 52, 53-54, 55, 57-58, 59-61;

[1] Mr. Spivey was subsequently transferred to the Alcohol Tax Unit (Tr. 147).

Palier: 103, 118, 120, 122, 123-124, 129-141 [2]). After Rosen left Ellis about 3:00 a.m. in the neighborhood of 14th Street and Third Avenue, Ellis, Spivey and Palier, keeping Rosen under constant surveillance, saw him meet petitioners and transfer money to Katherine Cohen. Both petitioners then left Rosen and went across the street into a cafeteria. Within a few minutes they rejoined Rosen and all three boarded a bus. They got off at 30th Street and Fourth Avenue, William Cohen left Rosen and Katherine, entered a doorway halfway down the block, reappeared within approximately three minutes, and handed an object to Rosen. The three of them walked a short distance and then Rosen left petitioners and, followed by Palier, boarded a bus. Upon alighting at 14th Street and Fourth Avenue, Palier took Rosen to one of the agents' cars, where Ellis received from Rosen two pieces of silver foil paper containing four capsules of heroin. (Gov. Ex. 1, Tr. 166; 151-157; Ellis: 9-15, 69-71, 78, 79, 80-81, 82; Palier: 102-107, 115, 118, 119, 122, 141; Spivey: 148-150, 174.)

At 10:30 p.m. on March 23, 1947, Palier and Ellis went through the same procedure with another voluntary informer, Chris Bell, to whom Ellis gave $28 in listed currency. Keeping Bell under continuous observation they saw him give the money to William Cohen and a few minutes later receive an object from Katherine Cohen. When Bell rejoined

[2] The designation "Tr." refers to the stenographic transcript of the trial proceedings.

Ellis, he gave Ellis a white paper napkin containing 10 capsules of heroin. (Gov. Ex. 2, Tr. 166, 169-170; Ellis: 16, 17, 18-23, 29, 87, 88-92; Palier: 107-109, 110, 115, 118-120, 125, 126, 141.) [3]

On March 25, 1947, petitioners were arrested by Palier and Ellis (Tr. 23, 110-111). A search of their persons revealed no narcotics on either, but disclosed $290 in William's pocket and ten $50 bills pinned inside the lining of his coat (Tr. 24, 25-27, 72, 73-74, 110-111, 112). After the arrest, Ellis, after advising Katherine of her constitutional rights, told her that narcotic addicts had told him that drugs she had sold them made them ill and caused abscesses on their arms. Katherine replied that "she used those same narcotics herself and that she had not had any complaints from any customers." (Tr. 27, 112-113.)

Later the same day, Ellis questioned both petitioners in his office with Palier and his chief, Irwin Greenfeld, present. He repeated the complaints their customers had made to him. William made no comment but Katherine reiterated the same answer given earlier. William admitted, however, that he had been selling narcotics to addicts. Petitioners explained the large sum of money found on William by stating that they purchased heroin in 10-ounce quantities from one Manga, that the money was to be used to pay off the balance owing Manga on some heroin which they had not yet received, and that

[3] Neither Rosen nor Bell testified, because they could not be located (Tr. 95-96, 132-133, 137, 150).

they were willing to assist the agents in obtaining evidence against Manga, provided the Government would set a low bond for William.[4] At this interview Ellis compared the serial numbers of the currency found on William with the list of the serial numbers of the bills given to Rosen and Bell and found that the numbers of six $1 and two $5 bills found on William corresponded to the numbers on bills given Bell on March 23, 1947. (Tr. 29-32, 34-39, 42, 112-113, 141, 177-179; Gov. Exs. 3, 3-A, 3-B.) At no time did the petitioners give the agents their correct address (Tr. 33, 111-112).

In defense, Katherine testified that she and William were married in Angola, New York, on March 20, 1945, by justice of the peace James Block (Tr. 180, 197); that she had been a dope addict but was cured (Tr. 180, 228); that she never heard of Rosen and Bell and did not know who they were (Tr. 184); that she had never seen Government Exhibits 1 and 2 (Tr. 188); that William's occupation was painting (Tr. 182); that she and William were not in New York on February 16 or March 23, 1947, having spent both weekends, in accordance with their usual custom, in Philadelphia with her sister Helen Louise Martin, whose address she gave as 201 South Fullup Street, Philadelphia (Tr. 183, 184, 222, 224); that she and William were beaten by the agents after their arrest and that she com-

[4] Twice thereafter Katherine and William repeated this request for a low bond "to assist the Government against Manga" (Tr. 41, 42, 177-179).

plained of such beatings to the police matron (Tr. 193, 221-222). She denied all admissions allegedly made by her to the agents (Tr. 186, 187-188, 227). She testified that she was of Turkish descent and celebrated Christmas on January 14 and that the money found on William on March 25, 1947, was withdrawn from The Girard Trust Company, Philadelphia, Pennsylvania, during the latter part of December 1946 for Christmas shopping which they had not yet done when they were arrested (Tr. 180, 225-226). She admitted using numerous aliases (Tr. 198-200, 204, 205, 207, 208, 209, 210, 211-212, 217, 218) and that she had been convicted on 12 occasions of prostitution, petty larceny and use of drugs (Tr. 180-181, 182, 201-202, 203-204, 205, 206, 207, 208, 209, 210, 211-212, 214, 215, 218).

In rebuttal, the Government produced the Angola justice of the peace, Floyd Hurst, who testified that since 1941 he was the only active justice of the peace in Angola, that no James Block was justice of the peace since he had been there, and that his records showed no marriage between Katherine and William Cohen on March 20, 1945, or any other marriage on that date (Tr. 234-242). The police matron of the jail where Katherine had been incarcerated testified that Katherine had at no time complained of beatings to her (Tr. 231).

To expedite the proceedings, because other Government witnesses had not had time to arrive, it was stipulated that a representative of Bellevue Hospital would testify that on March 25, 1947, Kath-

erine was brought to the hospital as a prisoner and received an intravenous injection of morphine for treatment of her then illness of drug addiction (Tr. 244); that a Treasury Department agent would testify that the Philadelphia address given by Katherine as the residence of her sister whom she and William allegedly visited during the week-ends in question was a six-story office building containing no places of residences and that no one by the name of Helen Louise Martin or anyone else lived in that building (Tr. 245); and that the treasurer of The Girard Trust Company of Philadelphia would testify that the Cohens maintained no account of any kind at that bank, that they had not withdrawn any money from the bank in the latter part of December 1946, and that the records showed no withdrawal by anyone of that amount at that time (Tr. 246).

During the summation by Government counsel the following ensued (Tr. 247U-247W):

> Mr. Martin: There is no sense in my trying to repeat what has been brought out in evidence. What I say is not evidence, but you have heard the evidence. * * *
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> * * * * *
>
> All we know from the evidence in this case, and we are restricted to the evidence in this case, is that this man Cohen was found stalking around the street at night, or at four o'clock in the morning, with a known prostitute, and part of the money that was given to her was

found on him, and in the law the man who lives on the proceeds of prostitution is not a painter but is, as the evidence indicates in this case, a pimp.

Mr. Kaye [defense counsel]: If your Honor please, I respectfully move for a mistrial on the ground of that informal remark made by counsel, adverting to no testimony, no evidence in the record, referring to the commission of another crime with which he is not charged.

The Court: I think this is fair comment.

* * * * *

Mr. Martin: Another thing you might consider. Why do these people give the address of 440 West 40th Street, when they do not live there? What were they concealing at their home? Was it because Cohen probably, as Katherine Cohen, Katherine Roberts, and so on down the list, has been piling up his seven or eight hundred dollar bank roll that he totes around the City of New York without any legitimate occupation?

Mr. Kaye: If your Honor please, I rise again to object to that kind of statement, charging the defendant with commission of the crime of compulsory prostitution.

The Court: Proceed, Mr. Martin.

Defense counsel did not request an instruction to the jury to disregard these remarks of the prosecutor to which he objected (Tr. 262).

The jury found petitioners not guilty on count 1 and guilty on count 2 (Tr. 266). Katherine was

sentenced to three years' imprisonment and a fine of $1. William was sentenced to five years' imprisonment and a fine of $1. (Tr. 277, 278.) On appeal, the convictions were affirmed, one judge dissenting (R. 12).

ARGUMENT

The court below correctly held that the attack upon the prosecutor's remarks must be appraised in the light of the circumstances in which they were made. As the majority said: "That the remark [the characterization of William Cohen as a "pimp"] was undignified for a representative of the United States Government, and in questionable taste, may be conceded. But whether it was so prejudicial as to deprive the defendant of a fair trial must be decided according to the laws of evidence rather than the laws of etiquette."

Petitioners argue (Pet. 8-10) that the prosecutor's remarks constitute reversible error as to Katherine as well as to William. So far as she is concerned, however, the remarks were based squarely on her own admissions that she had been convicted of prostitution several times. Her credibility was directly in issue, especially in view of her story, shown to be false, that the money found on William had been withdrawn from a Philadelphia bank three months earlier to be used for Christmas shopping. In these circumstances we think it was proper for the prosecutor to call attention to her record, and we do not understand that the dissent-

ing judge thought the remarks constituted error as to her.

The majority below, after a painstaking review of the evidence, concluded that the prosecutor's inference that William was a "pimp" "was not unfair" and "was not beyond the bounds of reason." Viewed in the light of developments at the trial, there is a sound basis for the conclusion.

William's possession of the substantial sum of money found on his person at the time of petitioners' arrest was a fact which assumed considerable significance at the trial. And it is clear that Katherine undertook in her testimony to defend William as well as herself. Contrary to the story both petitioners had given the agents that the money was to be used to purchase narcotics (see p. 4, *supra*), Katherine testified that it had been withdrawn from a bank in Philadelphia to be used for Christmas shopping. She also testified that she and William had been married since 1945 and that he was a painter. As the majority below pointed out, the obvious import of her testimony was that the money came from his earnings as a painter. But this story was discredited by the showing in rebuttal that petitioners were not married in Angola, New York, as Katherine claimed, and that the money was not withdrawn from the Philadelphia bank. In view of this evidence and the inconsistent stories told to the agents and from the witness stand, it was proper for the prosecutor to argue that the defense had made no offer to prove, apart from Katherine's

discredited testimony, that William had a legitimate occupation. But the money had come from some source and it was shown, as the prosecutor also argued, that Katherine was a known prostitute and, on her own testimony, that Katherine and William had been associated for a long time. There was, therefore, factual support in the evidence for an inference that William was living on Katherine's earnings as a prostitute.[5] The prosecutor made it clear in his remarks, moreover, that this was only an inference suggested by the evidence and told the jury that they were restricted to the evidence.

But even if it should be thought, contrary to the conclusion of the court below, that the prosecutor's suggested inference was lacking in evidentiary support and that the trial court erred in failing to correct it by an appropriate instruction, we submit that the remark cannot be said to have influenced the jury's decision. The evidence against petitioners, especially on the second count, was overwhelming, and Katherine's defense was utterly demolished. The agents saw Bell, the informer, give money to William and receive a package from

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[5] The prosecutor was in error in one of his statements of fact that "part of the money that was given to her [Katherine] was found upon him [William]." The only identified money found upon William was that used in the second purchase on March 23, 1947. On that occasion Bell gave the money to William and received the heroin from Katherine. None of the money used in the first purchase, when Rosen gave the money to Katherine and received the heroin from William, was found on William. But as the majority below said, notwithstanding this error, the prosecutor's conclusion "was not unfair as to the general conduct of the pair."

Katherine, and part of the money was found on William when petitioners were arrested two days later. Bell had been searched by the agents before the purchase and he was never out of their sight during the entire transaction. In view of this clear evidence of guilt on the second count, it is difficult to perceive how the jury could have reached any other verdict. Moreover, the fact that the jury acquitted petitioners on the first count shows care and deliberation in weighing the evidence, uninfluenced by irrelevant considerations. There was no evidence that any of the money used in making the purchase on February 16, 1947, was found on either petitioner and, in addition, the surveillance on that occasion was not as close as it was on March 23. As the dissenting judge indicated in his opinion, these factors undoubtedly left the jury in doubt as to the first count. This action of the jury demonstrates, we submit, that their verdict was based solely on the evidence and was not the result of appeal to their emotions and prejudices, as it is claimed.

Considering all the circumstances, we think the majority below were fully justified in refusing to nullify a just verdict reached on sober deliberation. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239-240; *Dunlop* v. *United States*, 165 U. S. 486, 498; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637-638 (C.A. 2), certiorari denied, 329 U. S. 742.

CONCLUSION

The question presented involves the application of settled principles to the particular facts of this case. No conflict of decisions is involved. We respectfully submit, therefore, that the issue is not one calling for further review by this Court and, accordingly, that the petition for a writ of certiorari should be denied.

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